

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
HARRISONBURG DIVISION

KELLY DENISE STATLER,  
Plaintiff

v.

JO ANNE B. BARNHART,  
Commissioner of Social Security,  
Defendant

) CASE NO. 5:04CV00086

)

)

) REPORT AND RECOMMENDATION

)

) By: B. Waugh Crigler

)

)

U. S. Magistrate Judge

This challenge to a final decision of the Commissioner which denied plaintiff's claim for a period of disability, disability income benefits and supplementary security income benefits under the Social Security Act (Act), as amended, 42 U.S.C. §§ 416, 423 and 1381 *et seq.*, is before this court under authority of 28 U.S.C. § 636(b)(1)(B) to render a report to the presiding District Judge setting forth appropriate findings, conclusions and recommendations for the disposition of the case. The questions presented are whether the Commissioner's final decision is supported by substantial evidence, or whether there is good cause to remand for further proceedings. 42 U.S.C. § 405(g). For the reasons that follow, the undersigned will RECOMMEND that an order enter AFFIRMING the Commissioner's final decision, GRANTING judgment to the defendant and DISMISSING the case from the docket of the court.

In a decision eventually adopted as a final decision of the Commissioner, a Law Judge found that plaintiff was insured from August 30, 2001, the alleged date of disability onset, until December 31, 2006, and that she had not been engaged in any gainful activity since the alleged disability of onset. (R. 17, 24.) He also found that plaintiff suffered fibromyalgia and TMJ which were severe impairments

though not severe enough to meet or equal any listed impairment. (R. 24.)<sup>1</sup> The Law Judge was of the opinion that plaintiff's complaints about the effects of her conditions were not entirely credible, and that she could perform light exertional activity within the limits of her past relevant work. (*Id.*) Accordingly, he found plaintiff able to perform her past relevant work, thus rendering her not disabled under the Act. (R. 24-25.)<sup>2</sup> The Appeals Council found no basis in the record to grant review, denied review and adopted the Law Judge's decision as a final decision of the Commissioner. (R. 5-6.) This action ensued.

The Commissioner is charged with evaluating the medical evidence, assessing symptoms, signs and findings, and, in the end, determining the functional capacity of the claimant. 20 C.F.R. §§ 404.1527-404.1545; *Hays v. Sullivan*, 907 F.2d 1453 (1990); *Shively v. Heckler*, 739 F.2d 987 (4<sup>th</sup> Cir. 1984). In that connection, the Commissioner regulatorily is granted some latitude in resolving inconsistencies in evidence and the court reviews the Law Judge's factual determinations only for clear error. 20 C.F.R. §§ 404.1527 and 416.927; *See also Estep v. Richardson*, 459 F.2d 1015, 1017 (4<sup>th</sup> Cir. 1972). In the end, if the Law Judge's resolution of the conflicts in the evidence is supported by substantial evidence then the Commissioner's final decision must be affirmed. *Laws v. Celebrezze*, 368 F.2d 640 (4<sup>th</sup> Cir. 1966).

Plaintiff had the burden in the sequential evaluation process to demonstrate the presence of

---

<sup>1</sup>Plaintiff also was diagnosed with depression and anxiety, but the Law Judge found these maladies not to be severe under the Act and regulations. (R. 17, 20-21.)

<sup>2</sup>A vocational expert (VE) was present at the hearing but did not testify to the availability of work in plaintiff's past relevant work categories or as alternate gainful activity.

severe impairments which prevented her from performing her past relevant work. 20 C.F.R. §§ 404.1520 and 416.920; *Hunter v. Sullivan*, 993 F.2d 31 (4<sup>th</sup> Cir. 1992). Had plaintiff discharged that burden, the burden would have shifted to the Commissioner to demonstrate that alternate gainful activity was available to her. The Commissioner could discharge her burden at the final sequential level of the evaluation only by the presentation of vocational evidence since there was some evidence that plaintiff suffered non-exertional limitations on her ability to perform work-related functions. *Hall v. Harris*, 658 F.2d 260 (4<sup>th</sup> Cir. 1981); *McLain v. Schweiker*, 715 F.2d 866 (4<sup>th</sup> Cir. 1983); *Coffman v. Bowen*, 829 F.2d 514 (4<sup>th</sup> Cir. 1987). However, the evaluation did not get that far because the Law Judge determined plaintiff could perform her past relevant work as an assistant retail store manager, receptionist and cashier. (R. 23, 24.)

The Law Judge certainly did not fail to comprehend that plaintiff, who was 27 years old with a high school education whose husband already was receiving disability benefits, suffered diagnosable maladies. The rub for the plaintiff, however, was that none of the treating, examining or record-consulting medical evidence suggested any objective reason for plaintiff's fibromyalgia or any physical limitations which would inhibit her performance in her past relevant work. Her TMJ was actively treated with steroids and anti-inflammatory medication, and there is no suggestion that this condition ever was disabling under the Act.

As to the mental elements of plaintiff's claim, the Law Judge noted a report of consultative examination by Arthur Steele, M.D., an internist, who opined that, in addition to her physical maladies, plaintiff suffered depression and anxiety which was "significant" and which, in combination, rendered plaintiff "probably unable to work." (R. 129.) On the other hand, DDS record assessors, were of the view that plaintiff's emotional impairments were not severe. (R. 132-143.) The only assessments of

plaintiff's residual functional capacity in the record before the Law Judge were those submitted by the DDS review physicians. (R. 132-143, 167-173.)

In addition to this evidence, the Law Judge based his decision not fully crediting the plaintiff and assessing her residual functional capacity to within the limits of her past relevant work, in substantial part, on her daily activities. (R. 22-23.) While a claimant's daily activities that amount merely to caring of oneself, including household activities and the like, are not to be considered substantial gainful activity, the level and the degree to which daily activities demonstrate the presence, intensity and persistence of symptoms and, ultimately an ability to function in a vocational setting, are factors the Commissioner may consider in determining a claimant's work-related capacity. 20 C.F.R. §§ 404.1529(c)(3)(i) and 404.1572(c). There is no doubt that the Law Judge's view of plaintiff's daily activities, along with the state agency functional capacity assessments, played a significant role in the Law Judge's determination of her credibility and in formulating the questions he posed to the VE.

Candidly, the undersigned cautiously approaches the Commissioner's use of daily activities either as a basis to discredit a claimant's testimony about the vocational effects of any malady or as a basis for hypothetical questions to a VE concerning the claimant's work-related limitations. There are two reasons for such caution. First, the evidence ordinarily adduced about the claimant's daily activities most often fails to rise above simply caring for one's self, thus bearing little connection to a vocational setting. Second, the Law Judge's findings and conclusions about the claimant's daily activities often run counter to substantial medical evidence concerning the claimant's residual functional capacity and appears to be offered as a rationale or justification for the Law Judge's rejection of that evidence where no other justification otherwise appears in the record. Here, however, the plaintiff's treating sources have offered no such functional assessments, and the state agency assessments are consistent with the Law Judge's assessment of plaintiff's daily activities.

In the end, the undersigned is of the view that there is substantial evidence in the record, as a whole, to support the Commissioner's final decision. It is RECOMMENDED that an order enter AFFIRMING the final decision of the Commissioner, GRANTING judgment to the defendant and DISMISSING this action from the docket of the court.

The Clerk is directed to immediately transmit the record in this case to the presiding United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note objections, if any they may have, to this Report and Recommendation within (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection. The Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTERED: \_\_\_\_\_  
U.S. Magistrate Judge

\_\_\_\_\_  
Date